Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1095

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a noncompensatory cash meal allowance paid to a state police trooper for the convenience of his employer is includible in gross income under Section 61 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 61 and 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and the Treasury Regulations, Sections 1.61-2 and 1.119-1 (26 C.F.R.) are set forth in the Appendix hereto, pp. 1A-7A.

STATEMENT OF THE CASE

At all relevant times respondent[1] was a trooper with the Division of State Police of the Department of Law and Public Safety of the State of New Jersey (hereinafter "State Police"). He originally joined the State Police in August 1960 and reenlisted in 1962 and 1964. During his second term he received tenure, and at all times he was a trooper in good standing with the State Police. (Pet. App. A, pp. 2A-3A.)

The State Police, created by act of the New Jersey legislature on March 29, 1921, is responsible statewide for all police functions and has primary responsibility in those areas of the state not within the jurisdiction of local authority. It also assists local police departments. (Pet. App. A, p. 3A.)

The executive and administrative head of the State Police is the Superintendent of State Police (hereinafter "Superintendent"). He is appointed by the Governor of the State. The Superintendent, with the approval of the Governor, makes all rules and regulations for the discipline and control of the State Police. The Superintendent is authorized to provide for the payment of commutation of rations (hereinafter "meal allowance") and quarters to those members of the State Police not provided with rations and quarters by the State. (Pet. App. A, p. 3A.)

The State Police, organized along military lines, is headed by the Superintendent who holds the rank of colonel. Below him in rank is the Deputy Superintendent who has the statutory rank of major. The remainder of the State Police is comprised of men with the statutory ranks of captain, lieutenant, sergeant, and trooper. In 1970 there were approximately 1,500 people in the State

1. References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year at issue.

Police, of whom approximately 900 were troopers. (Pet. App. A, p. 3A.)

Prior to July 1949, all troopers were supplied with meals at meal stations throughout New Jersey at the expense of the State. In those instances where a trooper was unable to eat at a meal station, he would secure a meal at his own expense at a public eating place and submit a voucher for reimbursement from the State. Despite various efforts at enforcing this system, it proved unsatisfactory. Each trooper would have to leave his patrol area unguarded for approximately an hour and a half to enable him to travel to his meal station, to eat his meal and to return to his post. Efforts aimed at staggering eating periods proved unworkable and drew complaints from the individuals in charge of the eating stations. Procedures adopted by neighboring states using a meal allowance system were surveyed, and, effective July 1, 1949, the State discontinued its meal operations and instituted a meal allowance system. (Pet. App. A, pp. 3A-4A.)

This system provided for a daily meal allowance for all members of the State Police while they were on active duty. In 1970 the meal allowance rate for troopers was $1,704[2] and this amount was paid without adjustment except for leave for military training. All troopers are entitled to the same meal allowance regardless of years in service or the actual amount of time spent on active duty. Their salaries increase with their length of service. (Pet. App. A, pp. 4A-5A.)

Meal allowance money and troopers' salaries are separately accounted for in the State Police's accounting system. Funds are never commingled between the salary account and the meal allowance account. The meal allowance is paid biweekly in advance and the salaries are paid biweekly in arrears. These amounts are separately stated on the troopers' biweekly checks. (Pet. App. A, p. 4A.)

2. Although respondent was entitled to $1,704 in meal allowance money, he received only $1,697.54. This slight difference is not relevant. (Pet. App. A, p. 4A, n.2.)

The meal allowance system was adopted to provide the State and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation. (Pet. App. A, p. 5A.)

Under this system the troopers are expected to eat at a public eating place within their assigned patrol area. Troopers are not permitted to accept any free meals. Before eating, a trooper must first check in with the officer in charge of his station and request permission to eat. The trooper must advise the officer in charge where he may be reached while eating. A trooper is subject to call during the eating period. Such calls are not an uncommon experience. (Pet. App. A, p. 5A.)

No restrictions are placed on a trooper's use of his meal allowance. A trooper is not required to account to the State for his meal expenses. A trooper may eat at home if it is within his assigned patrol area and if he receives permission to do so, or he may bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals. (Pet. App. A, p. 5A.)

State Police recruits are told that, in addition to their salary, a meal allowance will be paid to them in cash, which is in lieu of the State's furnishing meals they are required to eat while they are on active duty. The meal allowance is also a subject of negotiations between the State and the troopers' union. (Pet. App. A, p. 5A.)

A trooper is on active duty when he is in uniform performing his official duties. A trooper, however, is on call 24 hours a day and his actual active duty time is determined by the manpower needs of the station to which he is assigned. It is the policy of the State Police to give every man a broad scope of experience by giving him various assignments as operations permit, and during 1970

respondent had several different assignments. (Pet. App. A, p. 6A.)

Respondent was required to keep a record of his activity for each 24-hour period. Based on these records respondent spent 200 nights away from home on active duty. While on active duty he spent approximately $2 for breakfast, $3 for lunch, and $5 for dinner. Respondent spent the entire amount of his meal allowance for meals while on active duty. (Pet. App. A, p. 7A.)

Respondent reported $9,066 in wages and salaries on his 1970 federal income tax return. This amount included his base salary of $8,739.38 and meal allowance of $326.45[3]. He did not include the remaining $1,371.09 of meal allowance in the tax return. Respondent claimed as a miscellaneous itemized deduction $405 of food maintenance expenses.[4] Petitioner disallowed this deduction, determining that the meal allowance funds were includible as gross income under Section 61 of the Code, and calculated a deficiency of $69.54. (Pet. App. A, pp. 7A-8A.)

Subsequently, petitioner discovered that the remaining $1,371.09 of meal allowance funds received by respondent in 1970 was not included in respondent's tax return. Petitioner filed an Amendment to Answer of respondent's Petition in the United States Tax Court, to which respond-

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3. Prior to October 1, 1970, federal income tax was not deducted and withheld from the meal allowance paid to the troopers based on *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), reversing 21 T.C. 630 (1954). In October 1970 the state began to deduct and withhold the appropriate amounts after correspondence and discussions with the Commissioner of Internal Revenue. Consequently, only $326.45 of respondent's meal allowance was included on his Wage and Tax Statement (Form W-2) for the year 1970. (Pet. App. A, p. 7A, n.3.)

4. Although there is a minor difference between the meal allowance included as salaries and wages in the tax return as income and the amount of the deduction taken by respondent, petitioner does not dispute the correctness of the amount claimed as a deduction. (Pet. App. A, p. 8A, n.4.)

ent did not object, determining that this amount should also be included in gross income. Petitioner accordingly increased the deficiency to $330.70. (Pet. App. A, p. 8A.)

The United States Tax Court held that the meal allowance was includible in income under Section 61 of the Code and was not excludable from income under Section 119 of the Code, but that respondent was entitled to deduct part of the allowance as an expense under Section 162 of the Code. (Pet. App. A, pp. 8A-26A.) The opinion was reviewed by the full Tax Court, and seven judges dissented, including the trial judge, Judge Sterrett, who wrote the principal dissenting opinion. (Pet. App. A, pp. 32A-37A.)

Judge Sterrett (joined by five other judges) dissented on the ground that the meal allowance did not constitute gross income under Section 61 of the Code because, under the long-standing judicial and administrative "convenience of the employer" doctrine, respondent had shown "that it was not compensatory, was required to be received primarily for the benefit of his employer so that he could properly perform his duties, and additionally that it was spent for the purpose paid." (Pet. App. A, p. 37A.) Judge Sterrett's opinion did not reach the issues raised under Sections 119 and 162 of the Code.

The United States Court of Appeals for the Third Circuit reversed *per curiam* on the basis of its prior decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954), and on the basis of Judge Sterrett's dissenting opinion in the Tax Court. (Pet. App. B, pp. 38A-41A.)

ARGUMENT

1. Petitioner contends (Pet., pp. 6-7) that the decision below of the Third Circuit conflicts with the decision of the First Circuit in *Wilson* v. *United States*, 412 F. 2d 694 (1st Cir. 1969), in the interpretation of (i) Section 61(a) of the Internal Revenue Code and (ii) Section 119 of the

Code. There is, however, no such conflict, since the decision of the Third Circuit rested solely on Section 61 and the decision of the First Circuit in *Wilson* rested solely on Section 119.

The decision below was grounded on the Third Circuit's prior reasoning in *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954). *Saunders* was decided before the enactment of Section 119 and was based solely on the interpretation of Section 22(a) of the Internal Revenue Code of 1939, the predecessor of Section 61(a) of the Internal Revenue Code of 1954. This Court has held that Section 22(a) of the 1939 Code and Section 61(a) of the 1954 Code are identical in scope. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).

The decision below was also grounded on the reasoning of Judge Sterrett's dissenting opinion in the Tax Court, which was also based solely upon an analysis of Section 61 of the Code. The court below did not reach the issues raised under Section 119, because its holding under Section 61 was dispositive. The court below aligned itself in result only with the Fifth, Eighth and Tenth Circuits (Pet. App. B, p. 41A), which have ruled that meal allowances paid to state troopers are excluded from gross income under Section 119 of the Code.

The decision in *Wilson*, on the other hand, was based solely on Section 119. In *Wilson*, the First Circuit affirmed a decision of the United States District Court for the District of New Hampshire, [*Wilson* v. *United States*, 292 F. Supp. 200 (D.N.H. 1968)], where the opinion stated in its opening paragraph:

> "At the outset, the Court wishes to state emphatically that our decision is limited to the issue presented to us: whether the reimbursements received by the taxpayer are excludable from his gross income *under Section 119 of the Internal Revenue Code of 1954*." 292 F. Supp. at 203. (Emphasis in the original.)

The opinion of the First Circuit in *Wilson* was confined to a consideration of the technical requirements of Section 119. The First Circuit assumed, without analysis, that the payments were income under Section 61 of the Code, presumably because no issue had been presented to the Court under Section 61.

Thus, the reasoning of the court of appeals below does not conflict with the reasoning of the court of appeals in *Wilson*, because the two courts considered two different sections of the Code. The only conflict is in result, and even that conflict may never have arisen if the First Circuit had been asked to consider Section 61 of the Code. Accordingly, it would be premature to grant the writ in the present case.

2. Petitioner next contends (Pet., pp. 8-10) that the meal allowance cannot be excluded from income under Section 61 of the Code through application of the "convenience of the employer" doctrine applied in *Saunders*, because that doctrine is now exclusively confined to Section 119 of the Code. In support of this contention, petitioner relies primarily on this Court's decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). The petitioner's argument misconstrues the "convenience of the employer" doctrine, the relation of Section 119 of the Code to that doctrine and this Court's view of the scope of Section 61 of the Code. Moreover, the petitioner's argument, if adopted by this Court, would nullify several of the petitioner's own regulations and rulings.

The "convenience of the employer" doctrine holds that gross income does not include the value of meals or lodging provided to an employee by his employer if the meals or lodging are provided *for the convenience of the employer* and *not as additional compensation* to the employee. The origin of this doctrine dates back to the early years of the income tax. It has been embodied in the income tax regu-

lations since 1920. T.D. 2992, 2 Cum. Bull. 76. In the same year, the Bureau of Internal Revenue ruled in O.D. 514, 2 Cum. Bull. 90 (1920), that:

> "'Supper money' paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, such payment not being considered additional compensation and not being charged to the salary account, is considered as being paid for the convenience of the employer and for that reason does not represent taxable income to the employee."

This ruling, which is quoted in full, established early and clearly that it is immaterial whether the value of a meal is provided in cash or in kind, as long as the meal is not compensatory and is provided for the convenience of the employer. It should be noted that the quoted ruling does *not* require that the employee actually spend the supper money for supper. This ruling has been in full effect for more than half a century.

The first judicial recognition of the "convenience of the employer" doctrine occurred in *Jones* v. *United States*, 60 Ct. Cl. 552 (1925). In that case, the court held that neither the value of quarters nor the commutation in lieu of quarters furnished to a military officer constituted income, since neither was intended as or paid as additional compensation and since they were required for the proper performance of his duties.

The rationale of the *Jones* decision was incorporated and expanded in the income tax regulations. It is now included in Section 1.61-2(b) of the Treasury Regulations, which provides in relevant part as follows:

> *"Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service.* Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey and Public Health Service of the

> United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income."

It is significant that this regulation is promulgated under Section 61 of the Code, which defines gross income. *There has never been any specific statutory exclusion for amounts received by the hundreds of thousands of such personnel as subsistence and commutation of quarters.* It is also significant that the regulation extends to the Public Health Service, even though it is a part of the Department of Health, Education and Welfare rather than part of the military. See 42 U.S.C. Section 202.

By 1950, the "convenience of the employer" doctrine had evolved so as to be applied administratively:

> ". . . only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered." *Mim. 6472,* 1950-1 Cum. Bull. 15.

Thus, on the eve of the consideration and enactment of the Internal Revenue Code of 1954, it was the position of the Bureau of Internal Revenue that the "convenience of the employer" doctrine was not to be applied in situations where the employee's receipt of benefits was compensatory. In this context, Congress enacted the present Section 119 as part of the Internal Revenue Code of 1954. Section 119 excludes from an employee's gross income the value of meals provided to him by his employer for the convenience of the employer on the business premises, whether or not compensatory.

While Section 119 was the first specific legislative inclusion of the "convenience of the employer" doctrine, it was

not intended to preempt the field. The purpose of Section 119 was to carve out a safe harbor where the value of meals and lodging furnished for the convenience of the employer would be excluded from the gross income of the employee *even if* the meals and lodging were compensatory. See *H.R. Rep. No. 1337,* 83d Cong., 2d Sess. 18 (1954); *S. Rep. No. 1622,* 83d Cong., 2d Sess. 19 (1954). The Senate Finance Committee Report stated:

> "Under section 119 as amended by your committee, there is excluded from the gross income of an employee the value of meals or lodging furnished to him for the convenience of his employer whether or not such meals or lodging are furnished as compensation.
>
> "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income *to the extent that* such allowances constitute compensation." *S. Rep. No. 1622,* 83d Cong., 2d Sess. 190-191 (1954). (Emphasis added.)

From the foregoing it is clear that Section 119 was not intended to displace what has been described as the "common law 'convenience of the employer' test". 1 Surrey *et al., Federal Income Taxation,* 130 (1972). The regulations under Section 119 also recognize the non-exclusivity of that section. Treasury Regulations, Section 1.119-1(c)(2). Thus, under both the Senate Finance Committee Report and the Treasury Regulations, cash allowances for meals are includible in gross income *only if* they are compensatory.

More recently, the Treasury Department has reaffirmed the common law nature of the Code's definition of gross income in a Treasury Department document entitled "Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits," 1976 CCH Stand. Fed. Tax Rep. ¶ 8907, P-H 1976 Fed. Taxes ¶ 65,667, (Office of the

Assistant Secretary for Tax Policy, September 2, 1975), which states:

> "With the definition of 'income'—as in the case of other broad concepts such as 'due process' or 'equal protection'—most of the law must be discovered in a study of the ways in which the language has been interpreted. Thus, for example, official interpretations outstanding for decades hold that such things as travel passes for railroad employees or supper money for employees who work overtime are not to be included in income." 1976 CCH Stand. Fed. Tax Rep. ¶ 8907, at p. 77,371.
>
> "The Internal Revenue Code as presently interpreted by the regulations and the better reasoned case law requires more than a finding that an employee enjoyed an economic benefit. Section 61(a)(1) of the Code speaks of 'compensation *for* services'." Id. at p. 77,375. (Emphasis in the original.)

Thus, the "convenience of the employer" rule, which has been recognized both judicially and administratively for more than five decades, holds that the gross income of an employee does not include a meal allowance paid to him by his employer if (i) the allowance is noncompensatory, because it is (a) not intended as compensation and (b) not charged to the salary account, and (ii) the allowance is paid for the convenience of the employer. The petitioner asserts (Pet., pp. 8-10) that this rule does not apply to the respondent's meal allowance. In support of this assertion, the Commissioner relies on *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).

In *Glenshaw Glass,* this Court held that punitive damages for fraud and antitrust violations constituted gross income to the recipient on the ground that there was no evidence of congressional intent to exempt such payments from the broad scope of "income" within the meaning of Section 22(a) of the Internal Revenue Code of 1939, the predecessor of Section 61(a) of the 1954 Code. The case also held

that Section 22(a) of the 1939 Code and Section 61(a) of the 1954 Code are identical in scope in defining "income." In a similar case decided on the same day, *General American Investors Co.* v. *Commissioner,* 348 U.S. 434 (1955), this Court held that "insider profits" recovered by a corporation under the federal securities laws were includible in the gross income of the corporation on the authority of *Glenshaw Glass,* the Court stating:

> "The reasons which dictated that result are equally compelling here. We see no significant difference in the nature of these receipts which might make that ruling inapplicable. • • • There is no indication that Congress intended to exempt them from coverage." (348 U.S. at 436.)

Far from undermining the authority of *Saunders* v. *Commissioner,* 215 F. 2d 768 (3d Cir. 1954), these two cases would appear to reinforce its authority by holding that:

> (i) the meaning of the term "income" is the same in both the 1939 Code and the 1954 Code;
>
> (ii) the "nature of [the] receipts" must be examined to determine what constitutes "income"; and
>
> (iii) the congressional intent must be examined to determine whether a given receipt is to be excluded from "income."

Since "income" has the same meaning in both the 1939 and 1954 Codes, the reasoning of *Saunders* is just as applicable to Trooper Kowalski's meal allowance for 1970 as it was to Trooper Saunders' meal allowance for 1950. Moreover, Congress has expressed in at least two ways its intent to exclude from gross income receipts in the nature of noncompensatory meal allowances paid for the convenience of the employer.

First, Congress has repeatedly enacted Revenue Acts and has twice enacted and repeatedly amended Revenue Codes defining income without limiting the scope of either such administrative rulings as O.D. 514, 2 Cum. Bull. 90 (1920), relating to supper money and quoted in full, *supra*, p. 9, or such cases as *Saunders* v. *Commissioner*, 215 F. 2d 768 (3d Cir. 1954).

Second, the legislative history of Section 119, enacted in 1954, makes it clear that the taxability of cash allowances for meals continues to require analysis on a case by case basis. As stated above, Congress enacted Section 119 to provide a safe harbor within which meals might be furnished free of tax, *even if* they were compensatory, so long as the convenience of the employer was served. Congress intended to confine the operation of Section 119 to meals furnished in kind, leaving cash allowances in the position of having to continue to meet *both* conditions of the judicially and administratively evolved test.

Thus, Congress has clearly evidenced its intent to exclude from gross income meal allowances that are (i) paid for the convenience of the employer and (ii) noncompensatory, and the Commissioner of Internal Revenue has implemented this policy in his rulings and regulations. The criteria of *Glenshaw Glass* and *General American Investors* have been met.

On the factual level, there can be no doubt that the meal allowance paid to respondent falls squarely within the "convenience of the employer" doctrine, since the Tax Court found the following as facts:

> "[The meal allowance] system was adopted to provide the State and the public with better police protection. It also proved to be a less expensive method of handling this problem. The meal allowance was not intended to represent additional compensation." (Pet. App. A, p. 5A.)

Therefore, since the meal allowance paid to respondent is excluded from his gross income under a long-standing doctrine that in no way conflicts with the decisions of this Court, the writ should be denied. Since the decision below merely reaffirmed the *Saunders* case, decided in 1950, denial of the writ will in no way "invite further attempts by employers to provide tax-free compensatory payments to employees to defray the costs of meals or other personal living expenses," as petitioner warns (Pet., p. 8).

On the contrary, if this Court grants the writ and if the Court then rules in favor of the petitioner, it can reach such a decision only on the ground that cash subsistence allowances constitute gross income. Such a ruling from the Supreme Court of the United States would invalidate Treasury Regulations, Section 1.61-2(b), which excludes from gross income the subsistence and quarters allowances of hundreds of thousands of personnel in the Armed Forces, Coast and Geodetic Survey and Public Health Service of the United States. This, in turn, would subject these allowances to federal income tax, thereby either eroding the benefit to the recipients, with a concomitant loss of morale, or requiring a significant increase in the amount of the allowances in order to give the recipients the same benefit, at enormous expense to the federal government.

3. Petitioner finally contends that the court of appeals erred in holding that the meal allowance was excludable from gross income under Section 119 of the Code. This contention is mistaken because, as explained above, the court of appeals reached its decision solely under Section 61 of the Code and did not reach any issues raised under Section 119.

However, petitioner's contention points up his dilemma. On the one hand, he premises that the "convenience of the employer" doctrine has been confined exclusively to Section 119 since its enactment as part of the Internal Revenue

Code of 1954. On the other hand, he premises that *cash* allowances cannot qualify for exclusion from income under Section 119. The logically necessary conclusion from these premises is that cash allowances cannot qualify for exclusion from income under *any* circumstances. Yet, petitioner's own rulings (*e.g.*, O.D. 514, 2 Cum. Bull. 90) and Treasury Regulations [Sections 1.61-2(b) and 1.119-1(c)(2)] provide for the exclusion of cash meal allowances. Moreover, there is nothing in the legislative history of Section 119 to suggest that cash meal allowances cannot qualify for exclusion from income. To the contrary, the Senate Finance Committee Report cited and quoted by petitioner (Pet., p. 10) makes it clear that cash meal allowances are includible in gross income only to the extent that they constitute compensation. Since petitioner's argument defeats itself, the court of appeals' analysis of the law applicable to this case is irrefutably correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1977.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. **Gross Income Defined**

(a) **General Definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

(b) **Cross References.**—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

SEC. 119. **Meals or Lodging Furnished For the Convenience of the Employer**

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if:

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

Sec. 1.61-2 Compensation for services, including fees, commissions, and similar items

(a) In general. (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination of severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

• • •

(b) Members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service. Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are to be excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is to be excluded from gross income. • • •

Sec. 1.119-1 Meals and lodging furnished for the convenience of the employer

(a) Meals—(1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) Meals furnished without a charge. (i) Meals furnished by an employer without a charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the

convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances. In subdivision (ii) of this subparagraph, there are set forth some of the substantial noncompensatory business reasons which occur frequently and which justify the conclusion that meals furnished for such a reason are furnished for the convenience of the employer. In subdivision (iii) of this subparagraph, there are set forth some of the business reasons which are considered to be compensatory and which, in the absence of a substantial noncompensatory business reason, justify the conclusion that meals furnished for such a reason are not furnished for the convenience of the employer. Generally, meals furnished before or after the working hours of the employee will not be regarded as furnished for the convenience of the employer, but see subdivision (ii) (d) and (f) of this subparagraph for some exceptions to this general rule. Meals furnished on nonworking days do not qualify for the exclusion under section 119. If the employee is required to occupy living quarters on the business premises of his employer as a condition of his employment (as defined in paragraph (b) of this section), the exclusion applies to the value of any meal furnished without charge to the employee on such premises.

(ii) (a) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emegencies have actually occurred, or can reasonably be expected to occur in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

(b) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period. For example, meals may qualify under this subdivision when the employer is engaged in a business in which the peak workload occurs during the normal lunch hours. However, meals cannot qualify under this subdivision (b) when the reason for restricting the time of the meal period is so that the employee can be let off earlier in the day.

(c) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (c) when there are insufficient eating facilities in the vicinity of the employer's premises.

(d) A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a substantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.

(e) If the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished to each other employer will also be regarded as furnished for a substantial noncompensatory business reason of the employer.

(f) If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to such employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason.

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

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(c) Rules. (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on

the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals and lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

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